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- 1 (2) The case was then reassigned to Magistrate Judge Lenihan on July 19, 2016.
2 Upon further review of the case, Magistrate Judge Lenihan recognized that it was
3 an error to grant Plaintiff Rambert *in forma pauperis* status because Rambert has
4 accumulated three or more “strikes” and may not proceed *in forma pauperis*
5 absent a showing of imminent danger. *See* 28 U.S.C. 1915(g). Under the “three
6 strikes rule,” a prisoner who, on three or more prior occasions while incarcerated,
7 has filed an action in federal court that was dismissed as frivolous, malicious, or for
8 failure to state a claim, must be denied *in forma pauperis* status unless he is in
9 imminent danger of serious physical injury. 28 U.S.C. § 1915(g);
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11 (3) This Court may take judicial notice of court records and dockets of the Federal
12 Courts located in Pennsylvania as well as those of the Court of Appeals for the
13 Third Circuit. *See DiNicola v. DiPaolo*, 945 F. Supp. 848, 854 n.2 (W.D. Pa.
14 1996). The first strike against Rambert is *Rambert v. Barrett*, No. 2:95-cv-71-
15 BPM-FXC (W.D. Pa.), which was dismissed as legally frivolous on February 21,
16 1995. The second strike is *Rambert v. Horn, et al.*, No. 2:97-cv-337-DJL-FXC
17 (W.D. Pa.), which was dismissed for failure to state a claim on December 5, 1997.
18 The third strike is *Rambert v. Lavan, et al.*, No. 4:03-cv-370-MM-DB (M.D. Pa.),
19 which was dismissed for failure to state a claim on November 6, 2003;
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21 (4) Plaintiff Rambert raises several objections to the Report and Recommendation.
22 First, he contends that he did not file *Rambert v. Barrett*. This argument is easily
23 disposed of as this Court reviewed the electronic filing system for the Western
24 District of Pennsylvania, which shows that Plaintiff Rambert initiated the action
25 on January 17, 1995. The case was then dismissed as legally frivolous on February

1 21, 1995. Next, Rambert argues that *Rambert v. Barrett* was filed before the
2 PLRA was enacted and therefore cannot count as a strike against him. Again, this
3 argument is easily disposed of. The Third Circuit has held that pre-PLRA cases
4 can count as a strike. *Keener v. Pennsylvania Bd. of Probation and Parole*, 128
5 F.3d 143, 144 (3d. Cir. 1997) (joining those circuits in holding that dismissals for
6 frivolousness prior to the passage of the PLRA on April 26, 1996, count as
7 “strikes” under § 1915(g)). Rambert’s reliance on *Gibbs v. Ryan*, 160 F.3d 160
8 (3d. Cir. 1998) is misplaced. In *Gibbs*, the Third Circuit was addressing whether
9 the PLRA applied only to bringing a case as opposed to bringing and maintaining
10 a case;
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12 (5) Next Rambert argues that he did not bring the *Rambert v. Horn* case. As evidence
13 of this, he claims that during 1997 when *Horn* was filed, he resided in the Middle
14 District of Pennsylvania, yet *Horn* was filed in the Western District. Rambert
15 argues that a case can only be filed in the district where the incident giving rise to
16 the case occurred, and because he was residing in the Middle District at the time
17 the case was filed, he could not have filed a lawsuit in the Western District. Once
18 again, a quick review of the Western District of Pennsylvania electronic system
19 shows that Rambert did indeed initiate the case *Rambert v. Horn* on February 24,
20 1997;
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22 (6) Rambert further argues that the law of the case doctrine bars Magistrate Judge
23 Lenihan from “revoke[ing] or vacat[ing]” a prior ruling in the case. Dkt. No. 76 at
24 1. In other words, he argues that because Magistrate Judge Baxter already
25 “screened and ruled” on his motion to proceed *in forma pauperis*, Magistrate

1 Judge Lenihan cannot “revoke” that earlier ruling. *Id.* Once again Rambert
2 misstates the law. In circumstances where a prisoner was improperly granted *in*
3 *forma pauperis* status even though he has three strikes against him “the proper
4 remedy is to vacate the order granting IFP status,” require plaintiff to pay the
5 filing fee, and if he fails to do so, “dismiss the case with prejudice for failure to
6 prosecute.” *Howard v. Tennessee, Dept. of Corrections*, No. 1-12-0004, 2013 WL
7 3353893, at *3 (M.D. Tenn. July 2, 2013), *see also*, *Bronson v. Overton*, NO.
8 CIV.A 08053E, 2010 WL 2512345, *1 (W.D. Pa. May 27, 2010), *report and*
9 *recommendation adopted by*, 2010 WL 2519773 (W.D. Pa. June 17, 2010)
10 (vacating prior order granting *in forma pauperis* status to plaintiff);
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12 (7) Lastly, Plaintiff objects to the fact that this case was transferred to Magistrate
13 Judge Lenihan. He argues, without citation, that he should have been given the
14 opportunity to object to the transfer. Plaintiff is mistaken. The district court has
15 within its authority to assign and reassign case as it see fit in order to ensure the
16 orderly and efficient resolution of case;
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18 (8) Therefore, for the foregoing reasons, this Court finds that Plaintiff has three
19 strikes against him. As such, in order to proceed *in forma pauperis*, Plaintiff must
20 allege facts showing that he was in imminent danger of serious physical injury at
21 the time he filed the complaint. *See Abdul-Akbar v. McKelvie*, 239 F.3d 307, 315
22 (3d. Cir. 2001) *overruling Gibbs v. Roman*, 116 F.3d 83, 86 (3d Cir. 1997). In
23 determining whether Plaintiff was in imminent danger at the time of filing the
24 complaint, the Court must construe all allegations in a complaint in favor of
25 Plaintiff. *Gibbs v. Cross*, 160 F.3d 962, 965 (3d. Cir. 1998). Imminent dangers are

1 those dangers which are about to occur at any moment or are impending. *Abdul-*
2 *Akbar*, 239 F.3d 307 at 315. Practices that “may prove detrimental ... over time”
3 do not represent imminent dangers as the harm is not “about to occur at any
4 moment.” *Ball v. Famiglio*, 726 F.3d 448, 468 (3d Cir. 2013) *abrogated in part*
5 *on other grounds by Coleman v. Tollefson*, ___ U.S. ___, 135 S.Ct. 1759 (2015)
6 (quoting *Abdul-Akbar*, 239 F.3d at 315) (internal quotation marks omitted).
7 Further, even if an alleged harm may in fact be “impending”, it does not satisfy
8 the exception if it does not threaten to cause “serious physical injury.” 28 U.S.C. §
9 1915(g). Vague or conclusory allegations are insufficient to meet this standard.
10 *See Ball*, 726 F.3d at 468;

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12 (9) This Court has reviewed the operative complaint. *See* Dkt. No. 1, Ex. 1. Plaintiff
13 Rambert alleges that he has been placed on RRL without due process of the law.
14 *Id.* at ¶ 19. The complaint goes on to allege that all of the Plaintiffs have generally
15 suffered from, among other things, sensory deprivation and poor air quality in
16 their cells that causes “coughing and gagging.” *Id.* Plaintiffs charge that the
17 guards sabotage their food by placing items in it or give them “rotten” fruit. *Id.*
18 they also contend that the guards sabotage their legal mail, personal mail, and
19 their access to “Mental Health Stability TV.” *Id.* Plaintiffs further allege that they
20 are denied access to daylight and the exercise yard, that they are denied personal
21 hygiene products such as soap, shampoo, and toothpaste, and that the guards
22 remove some of the inmates’ special medical devices. *Id.* at ¶ 28. As a result,
23 Plaintiffs allege that they suffer “severe emotional, mental, and physical damage,
24 mental anguish and suffering, increased stress, heightened anxiety, severe
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1 difficulty [in] concentrating, short term memory problems, chronic depression,
2 agoraphobia, and unfathomable emotional pain and suffering[.]” *Id.* at ¶ 29. With
3 regard to physical injury, Plaintiffs charge that they are suffering from “cataracts,
4 prostatitis [sic], peripheral artery disease, heel spurs, arthritis, hypertension, and
5 high blood pressure[.]” *Id.* Viewing the allegations in the complaint most
6 generously to Plaintiff as this Court is required to do, the undersigned agrees with
7 Magistrate Judge Lenihan that there is no showing of imminent danger of a
8 serious physical injury. The most serious allegations—that Plaintiffs are being
9 denied clean air to breath and that some special medical devices are being
10 removed—are simply not enough, without more, to establish a showing of
11 imminent danger;
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- 13 (10) First, Plaintiffs do not allege that they are continuously denied clean air to breath.
14 Indeed, the Complaint alleges that the guards turn on “blowers to clear the air”
15 once all of the inmates “scream” for the guards to “give [them] air.” *Id.* at ¶ 28.
16 Nor do Plaintiffs allege physical impairments that they attribute to the lack of
17 fresh air. Therefore, the Court finds this situation distinguishable from *Gibbs v.*
18 *Cross*, 160 F.3d 962. In *Gibbs*, the Third Circuit held that a Plaintiff established a
19 showing of imminent damage by alleging “that he was forced to breathe particles
20 of dust and lint which were *continuously* being dispersed into his cell through the
21 ventilation system. By the time [Plaintiff] filed the underlying civil action in the
22 district court, he had been living under these conditions for some time and claims
23 to have been *suffering from ‘severe headaches, change in voice, mucus that is full*
24 *of dust and lint, and watery eyes.’”* *Id.* at 965 (emphasis added). Here, unlike in
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1 Gibbs, Plaintiffs simply allege short-term “coughing and gagging” until the
2 guards turn on the blowers to clear the air;

3 (11) Second, while Plaintiffs allege that the guards have removed “special/medical
4 devices [such as] neck/back braces,” this allegation, without more, simply is not
5 sufficient to establish the risk of imminent harm of serious physical injury. *Id.* at ¶
6 28. To the contrary, it is highly unlikely that neck or back braces would alleviate
7 the physical ailments that the Plaintiffs allege they suffer from (*e.g.*, cataracts,
8 peripheral artery disease, heel spurs, arthritis, hypertension, high blood pressure).

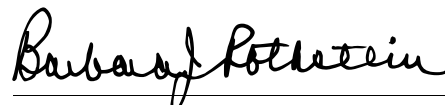
9 (12) Therefore, Plaintiff Rambert is barred from proceeding in this lawsuit *in forma*
10 *pauperis* under 28 U.S.C. § 1915(g);

11 (13) Based on the foregoing, the Court HEREBY ADOPTS the Report and
12 Recommendation of Magistrate Judge Lenihan, VACATES prior Order entered
13 by Magistrate Judge Baxter [Dkt. No. 25] that granted Plaintiff Rambert *in forma*
14 *pauperis* status, ORDERS that Plaintiff Rambert pay the \$400.00 filing fee, and
15 TERMINATES Plaintiff Rambert from this action until such time that he pays the
16 fee; and
17 fee; and

18 (14) The Clerk of the Court is respectfully directed to send copies of this Order to
19 Plaintiff, Defendants, and to Judge Lenihan.

20 **IT IS SO ORDERED.**

21 DATED this 15th day of September, 2016.

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Barbara Jacobs Rothstein
U.S. District Court Judge

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